July 21, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	Tri-Valley CAREs
Date of Filing:	June 22, 2005
Case Number:	TFA-0106

On June 22, 2005, Tri-Valley CAREs (the Appellant) filed an Appeal from a final determination issued on May 23, 2005 by the National Nuclear Security Administration's Albuquerque Service Center (NNSA). In that determination, NNSA responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. NNSA's determination identified and released several documents as responsive to this request. However, NNSA withheld portions of three documents under FOIA Exemption 2. This Appeal, if granted, would require NNSA to release that information to the Appellant, to conduct a new search for responsive documents, and to issue a new determination letter.

I. BACKGROUND

The Appellant filed a Request for Information with NNSA seeking information concerning a contract to construct a "Biosafety Level III Laboratory" at NNSA's Lawrence-Livermore National Laboratory (LLNL). On December 9, 2003, NNSA issued a partial response to the Appellant releasing one responsive document from which it had redacted information under Exemption 2. On May 23, 2005, NNSA issued a final determination letter (the Determination Letter) identifying and releasing a number of additional responsive documents and withholding portions of two documents under Exemption 2. On June 22, 2005, the Appellant submitted the present Appeal, which challenges its withholding determinations under Exemption 2, the adequacy of NNSA's search for responsive documents, and the adequacy of its determination.

II. ANALYSIS

Withholdings Under Exemption 2

NNSA withheld portions of three documents under FOIA Exemption 2: a slide presentation entitled *Highlights of Modular Construction Practices and Benefits of Modular Design*; a letter dated October 28, 2003, from John Fuelling to Mike Atkinson; and a letter dated October 30, 2003, from Atkinson to Fuelling.

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only Exemption 2 is at issue in the present case.

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

NNSA's Determination Letter indicates that it withheld portions of the letters and the slide show because their release could reveal information which could be used by terrorists or other enemies to harm national security interests. Specifically, the information withheld by NNSA under Exemption 2 consists of equipment diagrams, specifications diagrams, and floor plan designs of the Biosafety Level III Laboratory at the NNSA's Lawrence-Livermore National Laboratory.

That information is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities

among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31.

Release of the information at issue in the present case could allow espionage agents, terrorists or other malefactors to identify potential security vulnerabilities or assist such enemies' strategic planning. Accordingly, disclosure of the information at issue risks allowing espionage agents, terrorists, or any other potential malefactors to circumvent DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. Although it is obvious that the Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. Accordingly, we find that the information can be properly withheld under the "high two" prong of Exemption 2.

The Appellant also contends that release of the withheld information would be in the public interest. Specifically, the Appellant contends that the release of the withheld information would "inform surrounding communities about the proposed advanced biological warfare agent research at LLNL," provide the public with the ability to evaluate the fairness of the bidding process, and provide the public with an opportunity to discover governmental waste. We disagree. Even if the Appellant's contentions were accurate, when balanced against the potential harms discussed above, the potential for this information's misuse is too great for us to conclude that its release would further the public interest. Accordingly, NNSA may continue to withhold that information under Exemption 2.

Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency

search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

The Appellant contends that NNSA's search for responsive documents was inadequate. Accordingly, we contacted NNSA in order to review the search it conducted for documents that were responsive to the Appellant's request for information. NNSA informed us that the search was conducted by the DOE's Oakland Operations Office (OOO). The OOO was shut down and its FOIA files were transferred to the NNSA. Moreover, some of the individuals who apparently conducted the search for OOO have since left the DOE or LLNL. As a result, we were unable to obtain sufficient information about this search to conduct a meaningful review. Accordingly, at the NNSA's suggestion, we are remanding this portion of the Appeal to NNSA in order to allow it an opportunity to provide a more detailed description of its search or conduct a new search for documents that are responsive to the Appellant's request.

Adequacy of Determination

After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The agency must also provide the requester with an opportunity to appeal any adverse determination. *Id*.

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Research Information Services, Inc.*, 26 DOE ¶ 80,139 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996). Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

The Appellant contends that NNSA's determination is inadequate. First, the Appellant contends that the determination is inadequate because it does not explain why more responsive documents were not found. This contention is without merit. Neither the FOIA statute nor any relevant case law requires an agency to explain why responsive documents were not found. Therefore, NNSA was not under any obligation to do so.

Second, the Appellant contends that the determination is inadequate because it does not state whether requested documents ever existed or whether they were disposed of. Citing DOE FOIA Regulation 10 C.F.R. § 1004.4(d)(3), which states, in pertinent part, "[i[f a requested record is *known* to have been destroyed or otherwise disposed of, or if no such record is *known* to exist, the requester is so notified" (emphasis supplied), the Appellant contends that the NNSA was obligated to state whether requested documents were disposed of and whether they ever existed. This contention is based upon an erroneous interpretation of § 1004.4(d)(3). The regulation does not require NNSA to affirmatively state whether a requested document ever existed or was disposed of, *unless*, it had *knowledge* that a requested document never existed or was destroyed. In this case, NNSA does not have that knowledge.

Thirdly, the Appellant contends that the determination was inadequate because it did not state whether there had been previous contracts between DOE and Britz-Heidbrink and had not disclosed which permits were sought and obtained or were rejected for the performance of the contract. NNSA is not required to answer these questions, since it is well settled that the FOIA does not require agencies to answer questions posed as FOIA requests. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985); *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

Finally, the Appellant correctly noted that NNSA's determination did not indicate that it was withholding the contract price of the contract between LLNL and Britz-Heidbrink. Nor did it indicate under which FOIA exemption the contract price was being withheld. Therefore, the determination was inadequate in this respect. Accordingly, we are remanding this portion of the Appeal to the NNSA. On remand, NNSA should either release the contract price to the Appellant, or issue a new determination letter indicating which exemption(s) it is claiming along with a thorough explanation of why it finds the claimed exemption(s) applicable to the withheld information.

For the reasons stated above, we have concluded that the present appeal should be granted in part and denied in all other aspects.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CAREs, TFA-0106, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the National Nuclear Security Administration's Albuquerque Service Center for further processing, in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 21, 2005